

The pending bill includes an unfunded intergovernmental mandate in excess of the annual statutory limit of \$69 million within the next 5 years. Therefore, I raise a point of order against the substitute amendment pursuant to section 425(a)(2) of the Congressional Budget Act of 1974.

The PRESIDING OFFICER. The Senator from Montana.

Mr. BAUCUS. Mr. President, I move to waive the point of order for consideration of the pending legislation and ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be.

The yeas and nays are ordered.

The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I ask my friend from Montana, Senator BAUCUS, to be alert because I want to raise a similar request to set aside. But before I do that, I want to explain why I am doing this. I worked for 6 years to pass the Congressional Accountability Act, which was signed into law by President Clinton in 1995. I worked so hard because I strongly believed there should only be one set of laws in this country.

Prior to 1995, there were two sets of laws—one for Capitol Hill and one for the rest of the country because Congress exempted itself. That is why, following on that practice of 1995, I offered an amendment during the Finance Committee markup to require that Members of Congress and congressional staff get their employer-based health insurance through the same exchanges as our constituents. That is something for which I also heard complaints from the grassroots of Iowa during my town meetings. I did offer that amendment, and it was adopted without objection.

But then after careful consideration and examination of the bill Senator REID put together—and this was done by the Congressional Research Service—it was revealed that my amendment was changed under this closed-door merger process. Something cute happened. Under the bill we now have before us, this requirement would not apply to staff for committees of the Congress or leadership offices, it would apply to Members and their personal staff but not leadership. That is a real cute thing, to give exemptions for some people on Capitol Hill but not for others.

I ask unanimous consent to have printed in the RECORD an analysis from the Congressional Research Service.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

CONGRESSIONAL RESEARCH SERVICE,  
Washington, DC, Dec. 2, 2009.  
MEMORANDUM

To: Senate Finance Committee. Attention: Andrew McKechnie.

From: Ida Brudnick, Analyst on the Congress, Government and Finance Division; Todd B. Tatelman, Legislative Attorney, American Law Division.

Subject: Potential Statutory Interpretation of 1312(d)(2)(D)(ii)(II) of H.R. 3590, The Patient Protection and Affordable Care Act.

This memorandum responds to your request for a review and potential statutory interpretation of 1312(d)(2)(D)(ii)(II) of H.R. 3590, The Patient Protection and Affordable Care Act.<sup>1</sup> Specifically, you have asked whether the definition of the term "congressional staff" could be interpreted to exclude committee staff, leadership staff, or other employees of the Congress. The definition used by the bill covers "all full-time and part-time employees employed by the official office of a Member of Congress, whether in Washington, DC or outside of Washington, DC."<sup>2</sup> In addition, you have asked CRS to review the language used by S. 1796, America's Healthy Future Act of 2009, which was reported from the Senate Finance Committee.<sup>3</sup> S. 1796 used the term "congressional employee," which it defined as "an employee whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives."<sup>4</sup> Finally, you have requested that CRS examine what, if any, other Legislative Branch employees might be covered should language similar to that in S. 1796 ultimately be adopted.

Based on our review of the financial practices of the Congress with respect to payment of employees, the bill language, and applicable canons of statutory construction, it appears possible to argue that the definition of "congressional staff" used by 1312(d)(2)(D)(ii)(II) excludes any staff not directly affiliated with a Member's individual or personal office. Should this interpretation be adopted by an implementing body or a court, it would appear that it would exclude professional committee staff, joint committee staff, some shared staff, as well as potentially those staff employed by leadership offices including, but not limited to, the Speaker of the House, Majority Leader of the Senate, Minority Leader of the House, Minority Leader of the Senate, as well as the Whip offices in both the House and Senate. Moreover, this interpretation would arguably exclude other congressional employees, for example, those employed by the Office of the House Clerk, House Parliamentarian, House Historian, Secretary of the Senate, Senate Legal Counsel, House and Senate Legislative Counsel offices.

#### LEGISLATIVE BRANCH APPROPRIATIONS ACCOUNTS

The legislative branch appropriations acts funds the: Senate; House of Representatives; Joint Items;<sup>5</sup> Capitol Police; Office of Compliance; Congressional Budget Office; Architect of the Capitol, including the Capitol Visitor Center; Library of Congress, including the Congressional Research Service; Government Printing Office; Government Accountability Office; and Open World Leadership Program.

Both the House and Senate portions of the annual legislative branch appropriations bills contain one line item that provides for salaries and expenses within Member offices. The House and Senate sections contain additional line items for employees of leadership offices, committees, and officers.

In the Senate, the Senators' Official Personnel and Office Expense Account provides each Senator with funds to administer a per-

sonal office. It consists of an administrative and clerical assistance allowance, a legislative assistance allowance, and an official office expense allowance. The funds may be interchanged by the Senator, subject to limitations on official mail. The FY2010 legislative branch appropriations act provided \$122 million.

The Senate portion of the bill includes the following additional headings: Expense Allowances and Representation; Salaries, Officers, and Employees; Office of Legislative Counsel; Office of Legal Counsel; Expense Allowances for Secretary of Senate, Sergeant at Arms and Doorkeeper of the Senate, and Secretaries for the Majority and Minority of the Senate; and Contingent Expenses. The "Contingent Expenses" account includes funding for Inquiries and Investigations; Expenses of the United States Senate Caucus on International Narcotics Control; Secretary of the Senate; Sergeant at Arms and Doorkeeper of the Senate; Miscellaneous Items; and, Official Mail Costs.

Staff in personal offices in the House of Representatives are paid through funding provided for Members' Representational Allowances (MRA). The MRA, which was preceded by multiple allowances for each Member covering different categories of spending, was first established in 1996.<sup>6</sup> The FY2010 legislative branch appropriations act provided \$660.0 million for MRAs.

The House "Salaries and Expenses" account provides funding under the following additional headings: House Leadership Offices; Committee Employees; Salaries, Officers And Employees; And Allowances And Expenses. Many of these categories include multiple line items. In FY2010, the "House Leadership Offices" heading provided funding for the: Office of the Speaker; Office of the Majority Floor Leader; Office of the Minority Floor Leader; Office of the Majority Whip; Office of the Minority Whip; Speaker's Office for Legislative Floor Activities; Republican Steering Committee; Republican Conference Committee; Democratic Steering and Policy Committee; Democratic Caucus; Nine Minority employees; training and program development—majority; training and program development—minority; Cloakroom Personnel—majority; and Cloakroom Personnel—minority. "Committee Employees" provides funding in separate headings for "Standing Committees, Special And Select," and "Committee on Appropriations." Funding for "Salaries, Officers And Employees" is divided among various financial, administrative, legal, ceremonial, and security offices, including, for example, the offices of the Clerk of the House, Chief Administrative Office, Sergeant at Arms, Inspector General, and General Counsel.

#### POTENTIAL STATUTORY INTERPRETATION

When interpreting the meaning of legislative language, courts will often use methods of statutory construction commonly referred to as "canons," or general principles for drawing inferences about language. Perhaps the most common "canon of construction" is the plain meaning rule, which assumes that the legislative body meant what it said when it adopted the language in the statute. Phrased another way, if the meaning of the statutory language is "plain," the court will simply apply that meaning and end its inquiry.<sup>7</sup> As the United States Supreme Court stated in *Connecticut National Bank v. Germ*—

[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there . . .



When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.<sup>8</sup>

Applying the plain meaning canon to the language in H.R. 3590, it appears possible to argue that the phrase "official office of a Member of Congress" most naturally refers to Member's personal offices and, therefore, excludes other employees that a Member may utilize for other purposes. For example, Members who serve as committee chairman or ranking members may have staff affiliated with their service on a given committee. While the Member may have control over hiring, promotion, and even termination, those staff are paid by the committee and not the Member. Moreover, the Member's position on the committee is not commonly considered their "official office," as committee assignments may change during a Congress and are determined by the chamber caucuses. Furthermore, it is worth noting that CRS has been unable to locate any previous use of the phrase "official office of a Member of Congress" in statute or appropriations laws.

Alternatively, applying the plain meaning canon to the language used in S. 1796, it appears possible to argue that this language includes committee staff, leadership staff and most other congressional employees. The language, unlike that in H.R. 3590, turns on who the disbursing agent of the funds is, rather than who the employer is. As a result, the language in S. 1796 appears to be much broader, as most "congressional employees" have their pay disbursed from either the Secretary of the Senate or the Chief Administrative Office (CAO) of the House, regardless of whether they are employed in a Member's personal office, by a committee, leadership official, or in another capacity by the Congress. Moreover, unlike the language in H.R. 3590, similar text to that in S. 1796 has been used previously to categorize congressional staff for salary and benefits purposes.<sup>9</sup>

#### OTHER POTENTIAL ISSUES

The language in H.R. 3590 raises additional possible concerns in light of the way that the House and Senate conduct business. For example, one potential issue with proposing different standards for employees in Member office accounts and employees paid through other House and Senate accounts arises from the use of shared staff. Although the House and Senate have different rules regarding shared staff, both chambers allow types of shared staffing arrangements that could result in an employee being both on the payroll of a Member office and another type of office.

In the Senate, 2 U.S.C. 61-1a authorizes limited sharing of staff:

Notwithstanding any other provision of law, appropriated funds are available for payment to an individual of pay from more than one position, each of which is either in the office of a Senator and the pay of which is disbursed by the Secretary of the Senate or is in another office and the pay of which is disbursed by the Secretary of the Senate out of an appropriation under the heading "Salaries, Officers, and Employees", if the aggregate gross pay from those positions does not exceed the maximum rate specified in section 61-1(d)(2) of this title.

The Senate Handbook summarizes these laws, stating:<sup>10</sup>

An employee may be on the payroll of more than one Senator's office or on the payroll of a Senator's office and a leadership or administrative office, providing the aggregate pay received does not exceed the maximum annual salary for a Senator's office (2 U.S.C. 61-1a). An employee can only be shared between offices which are funded

through the appropriations, "Senators' Official Personnel and Office Expense Account" (Senators' personal staff), and "Salaries, Officers, and Employees".

The House Member's Handbook, as compiled by the Committee on House Administration, states the following about shared employees:<sup>11</sup>

The term shared employee means an employee who is paid by more than one employing authority of the House of Representatives.

Two or more employing authorities of the House may employ an individual.

Such shared employees must work out of the office of an employing authority, but are not required to work in the office of each employing authority. The pay from each employing authority shall reflect the duties actually performed for each employing authority. The name, title, and pay of such an individual will appear on each employing authority's Payroll Certification. Such employees may not receive pay totaling more than the highest rate of basic pay in the Speaker's Pay Order applicable to the positions they occupy.

Employees may not be shared between a Member or Committee office and the office of an Officer of the House if the employee, in the course of duties for an Officer, has access to the financial information, payroll information, equipment account information, or information systems of either Member, Committee, or Leadership offices.

Applying the interpretation of H.R. 3590 suggested above, it is possible that certain shared staff could be covered by the provision, while other shared staff, even in the same office, would not be covered.

Because the bill does not propose a standard for determining coverage, it is potentially left to the implementing authority to establish such a standard. The implementing authority would appear to arguably have wide discretion in setting such a standard. As a result, it is not unreasonable to assume that an implementing authority could use a majority time or similar standard in making coverage determinations. In other words, shared employees would need to declare whom they spent a majority of time working for. If the staffer's declaration was the Member's official office, they could arguably be covered. On the other hand, if the majority of a staffer's time was spent on committee or leadership work, they may arguably not be covered. It is important to note that this is but one possible standard and that unless otherwise stated in the bill, it will up to the implementing authority to determine the standard.

The language of S. 1793 arguably avoids this problem as it appears to encompass all shared employees because they all receive salaries through either the CAO or Secretary of the Senate.

Another potential issue is the scope of the disbursing authority of the CAO of the House and the Secretary of the Senate. The CAO has served as the disbursing officer for the House of Representatives since 1995. The Secretary of the Senate serves as the disbursing officer for the Senate. Both of these officers are required to publish reports on disbursement.<sup>12</sup> Pursuant to the FY2010 legislative branch appropriations act, the Secretary and CAO are each responsible for the disbursements for two accounts included as "joint items." Additional disbursements by the Secretary include salaries and expenses of the Joint Economic Committee and Office of Congressional Accessibility Services.<sup>13</sup> The CAO serves as the disbursing officer for the Joint Committee on Taxation and the Office of Attending Physician. In addition, the CAO

and Secretary also have disbursing authority for a number of House and Senate revolving funds.<sup>14</sup> Thus, it appears possible to argue that, should the language of H.R. 3590 be interpreted as suggested above, these employees would be excluded from coverage. Conversely, should the language from S. 1793 be utilized, it would appear that employees of these committees would be covered as they are paid by the CAO or Secretary of the Senate.

Finally, there is the issue of what, if any, other entities or employees of the Legislative Branch the CAO and/or Secretary of the Senate may serve as the disbursing officers. Our research indicates that although the CAO and Secretary of the Senate served as the disbursing officers for the U.S. Capitol Police (USCP) prior to 2003, the Chief of the Capitol Police currently serves as the disbursing officer for the USCP.<sup>15</sup> Moreover, it appears that other Legislative Branch agencies such as the Architect of the Capitol and the Congressional Budget Office each have their own disbursing agents and do not use either the CAO or the Secretary of the Senate. In addition, it appears that the CAO and/or Secretary of the Senate may serve as the disbursing agent for some, but not all, congressional commissions. Thus, some employees of such commissions may be covered by the language used in S. 1793, however, none would appear to be covered by the language used in H.R. 3590.

#### ENDNOTES

<sup>1</sup> Patient Protection and Affordable Care Act, H.R. 3590, §1312(d)(2)(D)(ii)(II), 111th Cong. (2009).

<sup>2</sup> See id.

<sup>3</sup> America's Healthy Future Act of 2009, S. 1796, §2231(3)(C), 111th Cong. (2009).

<sup>4</sup> Id.

<sup>5</sup> In the FY2010 legislative branch appropriations act, these included the: Joint Economic Committee, Joint Committee on Taxation, Office of the Attending Physician, Office of Congressional Accessibility Services.

<sup>6</sup> Committee Order No. 41, effective September 1, 1995, in notes to 2 U.S.C. §57; P.L. 104-53, 109 Stat. 519 (Nov. 19, 1995); U.S. Congress, House Committee on Appropriations, Legislative Branch Appropriations Bill, 1996, report to accompany H.R. 1854, 104th Cong., 1st sess., H. Rept. 104-141 (Washington: GPO, 1995), p. 10; P.L. 104-186, 110 Stat. 1719 (Aug. 20, 1996); 2 U.S.C. §57b; P.L. 106-57, 113 Stat. 415 (Sept. 29, 1999).

<sup>7</sup> See *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); see also *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992); *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 300 (1989).

<sup>8</sup> *Connecticut National Bank*, 503 U.S. at 253-54 (citations and quotation marks omitted).

<sup>9</sup> See, e.g., 2 U.S.C. §60a-1 (2006); 2 U.S.C. §60j (2006); 2 U.S.C. §130b (2006); 2 U.S.C. §1301 (2006); 2 U.S.C. §1977 (2006); 5 U.S.C. §5306 (2006); 5 U.S.C. §5515 (2006); 18 U.S.C. §207 (2006).

<sup>10</sup> U.S. Senate, Committee on Rules and Administration, *Senate Handbook*, version of Nov. 2006, 1V-31.

<sup>11</sup> U.S. House of Representatives, *Member's Handbook*, available at, <http://cha.house.gov/staff.aspx>.

<sup>12</sup> 2 U.S.C. §§104a and 104b.

<sup>13</sup> P.L. 111-68, 123 Stat. 2030, Oct. 1, 2009.

<sup>14</sup> For additional information, see: CRS Report R40939, *Legislative Branch Revolving Funds*, by Ida A. Brudnick and Jacob R. Straus.

<sup>15</sup> P.L. 108-7, Feb. 20, 2003, 117 Stat. 366; 2 U.S.C. 1907.

Mr. GRASSLEY. This carve-out creates a double standard and is totally